STATE OF MICHIGAN

COURT OF APPEALS

CARL BOMBRYS, Plaintiff-Appellant,	UNPUBLISHED April 20, 2010
v	No. 293276 Cass Circuit Court
SANDRA A. ZECCHINI, Defendant-Appellee.	LC No. 2008-000367-DC

Before: SERVITTO, P.J., AND FITZGERALD AND BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right the order awarding defendant physical custody of the parties' minor child, Tyler Bombrys, and awarding the parties joint legal custody of the child. We affirm.

The parties cohabitated together in Marcellus beginning in 2000 or 2001 and Tyler was born of the relationship on August 29, 2003. In March 2008 defendant moved nearer to her family in Flint and agreed to allow Tyler to remain in Marcellus to finish the school year. Defendant exercised parenting time after moving. At the end of the school year, plaintiff initiated this custody action and sought physical and legal custody of Tyler. The trial court, after finding that an established custodial environment did not exist with plaintiff, found "by preponderance of the evidence, that [defendant] should have physical custody. In fact, I find by clear and convincing evidence that [defendant] should have physical custody."

Plaintiff first argues that the trial court erred in determining that Tyler did not have an established custodial environment with plaintiff.

We review a trial court's findings regarding the existence of an established custodial environment under the great weight of the evidence standard, and will affirm the trial court's determination unless the evidence clearly preponderates in the opposite direction. *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008), citing MCL 722.28.

Child custody disputes are governed by the Child Custody Act (CCA), MCL 722.21 *et seq*. *Berger*, 277 Mich App at 705. MCL 722.27 provides in relevant part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act …

* * *

> (c) … The court shall not modify or amend its previous judgments or orders *or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child*…. [Emphasis added.]

A custodial environment exits if:

> over an appreciable time the *child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.* The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c) (emphasis added).]

Here, a review of the record reveals that the trial court's finding that an established custodial environment did not exist with plaintiff is against the great weight of the evidence. Plaintiff was actively involved in Tyler's life from the time of his birth, and the evidence shows that over an appreciable time period Tyler naturally looked to plaintiff for "guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). And, evidence showed that plaintiff provided "care, discipline, love, guidance, and attention" that was appropriate for a young child like Tyler. *Berger*, 277 Mich App at 706-707. However, we find that the trial court's error was harmless, because, as discussed below, there was clear and convincing evidence to show that awarding defendant physical custody was in Tyler's best interests.

The purposes of the Child Custody Act are to promote the best interests of the child, and to provide a stable environment for him or her, free of unwarranted custody changes. MCL 722.26(1). A trial court cannot issue an initial custody order without first determining the best interests of the child. *Grew v Knox*, 265 Mich App 333, 336; 694 NW2d 772 (2005). In making this determination, a court must consider and state its findings and conclusions as to each, evaluate, and determine each of the statutory best interests factors set forth in MCL 722.23. *Sinicropi v Mazurek*, 273 Mich App 149, 182; 729 NW2d 256 (2006). The trial court's findings regarding each best interests factor are reviewed under the great weight of the evidence standard. *McIntosh v McIntosh*, 282 Mich App 471, 475; 768 NW2d 325 (2009). These factors include:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
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> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
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> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

On appeal, plaintiff challenges the trial court's findings with respect to all of the best interest factors except for factor (i), reasonable preference of the child, which the trial court did not consider, and factor (k), domestic violence, which the trial court weighed in favor of defendant.

Factor (a) concerns the "love, affection, and other emotional ties existing between the parties involved and the child." The trial court weighed this factor equally between both parties. In this case, evidence showed that plaintiff planned Tyler's birth with defendant and cared for the child when he was an infant. Plaintiff lived with Tyler for a majority of the child's life, provided financially for Tyler, disciplined and instructed Tyler, and spent time with Tyler. After defendant moved away, plaintiff brought Tyler to necessary medical appointments, visited his school, picked him up after school, brought him to church and involved him in a tee-ball league. Dr. Paul Steven Kitchen, a doctor of psychology, who evaluated both parties and Tyler, testified that plaintiff was a good parent worthy of custody. A Child Protective Services (CPS) worker, testified that Tyler appeared bonded to plaintiff and was happy and well cared for when she observed him at plaintiff's residence.

Similarly, evidence showed that defendant had significant love, affection and an emotional bond with Tyler. Defendant planned Tyler's birth with plaintiff; she lived with Tyler on a full-time basis for the majority of his life excluding March to July 2008 when she moved to Mount Morris, and she worked to help provide financially for Tyler. Until she moved away, defendant was Tyler's primary caregiver and she took Tyler to the majority of his medical appointments. Defendant testified that one reason she moved was so that Tyler and her other children would have an opportunity for a better life. After she moved, defendant continued to visit Tyler, she remained involved in Tyler's education, she provided clothes for Tyler, and continued to help pay bills associated with plaintiff's house. Defendant started bringing Tyler to

church when she had parenting time in Mount Morris. Dr. Kitchen testified that defendant was a good parent and worthy of custody; he slightly favored awarding her physical custody of Tyler. The CPS worker testified that Tyler appeared bonded to defendant. Defendant testified that she wanted to instill good morals in Tyler. In sum, we conclude that the trial court's finding in respect to this factor was not against the great weight of the evidence.

Factor (b) concerns "the capacity and disposition of the parties involved to give the child love, affection, guidance and to continue the education and raising of the child in his or her religion or creed, if any." The trial court weighed this factor in favor of defendant. As discussed above, evidence showed that both parties have love and affection for Tyler. Similarly, evidence showed that both parties are equally capable of continuing Tyler's education and raising him in his religion. However, the record indicates that defendant had more capacity to provide Tyler with proper guidance. Plaintiff's behavior in the home set a poor example for Tyler. When the parties lived together, plaintiff angrily stormed around the house when he did not get his way and he spoke in a sexually degrading and disrespectful manner about defendant in front of other people in the same household where Tyler was present. Plaintiff argued with defendant in a loud manner if she did not have sexual relations with him when he wanted and he tried to control nearly every aspect of defendant's life. Plaintiff also engaged in a sexual relationship with Tyler's live-in nanny who testified that plaintiff paid her to engage in sex. In addition, plaintiff was convicted of domestic violence on two separate occasions and he refused to attend court-ordered counseling. The evidence supported that plaintiff's behavior set a poor example for Tyler. Additionally, the live in nanny testified that, after defendant moved away, the household was uncontrolled. She explained that plaintiff pulled Tyler's hair on several occasions when he was angry. Further, plaintiff failed to obtain professional counseling for his older daughter after she intentionally cut herself. In sum, we conclude that the trial court's finding with respect to factor (b) was not against the great weight of the evidence.

Factor (c) concerns "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . ." The trial court weighed this factor in favor of defendant. After reviewing the record, we conclude that the trial court's finding was not against the great weight of the evidence with respect to this factor. Here, both parties worked fulltime to provide for Tyler and the other children and plaintiff provided health insurance for Tyler. Plaintiff owned his own home and defendant testified that she owned a trailer. While plaintiff may have slightly better capacity to meet Tyler's material needs, defendant has superior capacity and disposition to meet Tyler's medical needs. When the parties lived together, defendant primarily brought Tyler to his medical appointments, and plaintiff only accompanied her on a few occasions. Defendant testified that plaintiff, who had no medical education, believed he could determine whether the children needed medical attention. Additionally, plaintiff failed to obtain professional care for his older daughter after she intentionally cut herself.

Factor (d) concerns "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." The trial court weighed this factor equally between both parties. Tyler resided at plaintiff's Marcellus residence for the majority of his life, but the evidence does not support that this environment was "stable" or "satisfactory." As discussed above, the parties had an acrimonious relationship when they lived together. Plaintiff did not control his anger, tried to control defendant, was addicted to sex, and engaged in

an affair with Tyler's hired caregiver. He did not take steps to correct his behavior. In addition, plaintiff allowed multiple individuals to reside at the Marcellus residence and he allowed an individual, whom he called a "pedophile," to frequent the residence when Tyler was present. On this record, we conclude that the trial court's finding with respect to this factor was not against the great weight of the evidence.

Factor (e) concerns, "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes." "[T]he focus of [factor (e)] is the child's prospects for a stable family environment." *Ireland v Smith*, 451 Mich 457, 465; 547 NW2d 686 (1996). "The stability of a child's home can be undermined in various ways. This might include frequent moves to unfamiliar settings, a succession of persons residing in the home, live-in romantic companions for the custodial parent, or other potential disruptions." *Id*. at n 9. In this case, the trial court weighed this factor in favor of defendant and this finding was not against the great weight of the evidence. Here, as previously discussed, plaintiff's home was not a stable and satisfactory environment before or after defendant moved away.

Factor (f) concerns, "[t]he moral fitness of the parties involved." "Moral fitness" under factor (f) relates to "a person's fitness *as a parent*." *Fletcher v Fletcher*, 447 Mich at 886, 887; 526 NW2d 889 (1994). Factor (g) concerns the "mental and physical health of the parties involved." The trial court weighed both these factors in favor of defendant and we conclude that the trial court's findings were not against the great weight of the evidence. Evidence showed that plaintiff did not control his anger. Plaintiff would storm around the home when he did not get his way, he argued and became angry with defendant when she did not comply with his sexual demands. Plaintiff pulled Tyler's hair on several occasions when he spanked the child. Plaintiff had two domestic violence convictions and he refused to comply with court-ordered counseling. Plaintiff's behavior set a poor example for Tyler. In contrast, while the evidence showed that defendant had moral fitness issues, including involvement with drugs, she attended counseling sessions to try and resolve the issues she and plaintiff were experiencing. In sum, the trial court's findings with respect to these factors were not against the great weight of the evidence.

Factor (h) concerns the "home, school, and community record of the child." The trial court weighed this factor equally between both parties. Although Tyler spent the first five years of his life in Marcellus with both parties, Tyler was not actively involved in the Marcellus community. At the time of the de novo hearing, Tyler had attended one year of school, and had just started participating in a local tee-ball league and a local church. Before the proceedings, Tyler did not attend church or other community events for young children. In addition, Tyler has extended family in both Marcellus and Mount Morris. As detailed above, Tyler's home in Marcellus was unstable. The evidence does not "clearly preponderate in the opposite direction" of weighing this factor equally between both parties.

Factor (j) concerns "the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." We agree with plaintiff that the trial court's finding that this factor favored defendant was against the great weight of the evidence. The evidence shows that factor (j) should have been weighed equally between both parties. Both parties engaged in behavior that inhibited Tyler's relationship with each parent. Plaintiff's treatment of defendant while the two lived together in Marcellus set a poor example for Tyler and in that respect did not

encourage Tyler to love and respect defendant. Near the time he initiated court proceedings, plaintiff feigned excuses to keep Tyler away from defendant. But, after plaintiff initiated court proceedings, according to plaintiff, defendant refused to allow plaintiff to see Tyler for almost 20 days. In addition, after the referee's hearing, when the parties alternated parenting time on a week-to-week basis, defendant refused to allow plaintiff to keep Tyler a few extra hours on Fridays so that Tyler could play tee-ball.

Factor (l), concerns "any other factor considered by the court to be relevant to a particular child custody dispute." The trial court weighed this factor in favor of defendant after considering the challenges that plaintiff faced in parenting his two other children. Evidence showed that plaintiff had a difficult task in raising his two children from previous relationships. Both children faced issues that required plaintiff's attention. Dr. Kitchen testified that plaintiff would have greater difficulty parenting Tyler. In contrast, there was no evidence that defendant's two other sons had any problems that required intensive parental attention. The trial court's findings were not against the great weight of the evidence.

In sum, the trial court found factors (b), (c), (e), (f), (g), and (l) in favor of defendant, and we conclude that the trial court's findings with respect to these factors were not against the great weight of the evidence. *Fletcher*, 447 Mich at 876-877, 879. The trial court found factors (a), (d), and (h) to weigh equally between both parties, and we conclude that the trial court's findings were not against the great weight of the evidence. *Id*. The trial court weighed factor (j) in favor of defendant, and we conclude that the trial court's finding was against the great weight of the evidence and that the trial court should have weighed this factor equally. *Id*. Regardless, after reviewing the record and the statutory best interest factors, we conclude that the trial court did not abuse its discretion in finding that there was both a preponderance of evidence and, in the alternative, clear and convincing evidence to support awarding defendant physical custody of the child. *Fletcher*, 447 Mich at 876-877, 879. Reviewing the record in this case does not lead us to conclude that the trial court's ultimate custody order "is so palpably grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Berger*, 277 Mich App at 705. As discussed above, seven of the best interest factors weighed in favor of defendant, four factors weighed equally, and none of the factors weighed in favor of plaintiff. Any error in the trial court's finding in regard to an established custodial environment was harmless where there was clear and convincing evidence to award defendant physical custody, and remand is not warranted. *Fletcher*, 447 Mich at 889 (an impropriety in adjudication of a child custody dispute does not require remand for reevaluation where the impropriety is harmless).

Finally, plaintiff argues that the trial court violated MCL 722.31 by awarding defendant physical custody of Tyler because defendant lives over 100 miles away from plaintiff. Plaintiff failed to preserve this issue for review because he did not raise this issue in the trial court. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). We review unpreserved errors for plain error affecting substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008). The interpretation and application of a statute involves a question of law that we review de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005).

MCL 722.31 provides in relevant part as follows:

> (1) A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.
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> (3) *This section does not apply if, at the time of the commencement of the action in which the custody order is issued, the child's 2 residences were more than 100 miles apart*…. [Emphasis added.]

Under MCL 722.31(1), where a child's custody is governed by court order, the court must consider the factors set forth in MCL 722.31(4) before permitting a parent to change the legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the custody order was issued. In this case, Tyler's custody was not governed by court order before plaintiff commenced the present action for custody. Thus, MCL 722.31 does not apply to the trial court's custody decision.[1]

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[1] Even assuming that custody was governed by a court order as a result of the temporary order awarding the parties joint physical and legal custody of Tyler upon the commencement of the present action, at that point Tyler had a legal residence with both defendant, in Mt. Morris, and with plaintiff, in Marcellus. MCL 722.31(1). Because Tyler's two residences were more than 100 miles apart, MCL 722.31 does not apply. MCL 722.31(3).